IN THE

Supreme Court of the United States

October Term, 1978

No. 78-822

JOSEPH WILCZYNSKI,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH WILCZYNSKI,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, JOSEPH WILCZYNSKI, respectfully requests that a Writ of Certiorari issue to review the judgment and order of the Court of Appeals of the State of New York entered on or about November 1, 1978, denying leave to appeal to said Court, affirming a judgment of the Appellate Division, First Judicial Department for the State of New York entered on or about October 12, 1978, which in turn affirmed the judgment of the Supreme Court of the State of New York, Trial Term, New York County, entered on or about September 6, 1977, convicting petitioner after a jury trial of the crimes of Grand Larceny in the Third Degree in violation of Section 155.30 of the New York State Penal Law and the crime of Official Misconduct in violation of Section 195.00 of the New York State Penal Law.

As a consequence of these convictions, the petitioner was sentenced to a jail term of nine (9) months imprisonment.

OPINION BELOW

The Appellate Division for the First Judicial Department for the State of New York affirmed the judgment of conviction without a written opinion.

The Court of Appeals for the State of New York denied leave to appeal to said Court without written opinion.

JURISDICTION

The Order of the Court of Appeals for the State of New York denying leave to appeal to said Court was rendered on November 1, 1978.

The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1257(2) and (3), and under Rule 19(1) of the Rules of the Supreme Court.

QUESTIONS INVOLVED

1. Did the Trial Court amend the indictment by adding the theory of aiding and abetting where the Grand Jury finding said indictment did not charge that theory thereby denying the petitioner his constitutional right under the 5th Amendment?

2. Was the Trial Court's refusal to inspect, in camera, the Grand Jury Minutes and charge on the law given to said Grand Jury for the theory of the case, a denial of Due Process in violation of the 14th Amendment to the U.S. Constitution?

RULES OF THE SUPREME COURT

Rule 19, Considerations Governing Review on Certiorari.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

STATEMENT OF THE CASE

The Petitioner, a police officer in the New York City Police Department, was charged with Grand Larceny in the Second and Third Degrees, in that *he* ". . . did steal from Aida Velasquez certain property . . . " (counts one and two of Indictment), and with official misconduct (Count three of Indictment).

The indictment did not refer to any theory of accomplices, nor to any theory of conspiracy, and did not charge the defendant with liability for the acts of another (Penal Law of New York State, Article 20).

Testimony at trial indicated that: On November 20, 1975, at approximately two o'clock in the morning the police responded to apartment 10 at 709 East Sixth Street, County of New York. A search of that apartment resulted in no arrests but the petitioner allegedly took a bullet proof vest from the apartment.

As the officers (Farrelley, Smith, Wilczynski and Manisera) were leaving they saw Aida Valsquez walking upstairs and they brought her to her apartment (number 9). An immediate search revealed a weapon, some heroin, and three hundred odd dollars in a case, all of which were seized and vouchered, in the local Precinct. Valasquez was arrested. Valasquez testified that Smith removed a paper bag from a hamper containing fifteen thousand dollars. No other witness saw the contents of the bag.

Officer Manisera testified that he saw Wilczynski take an unknown sum of money from a drawer in the bedroom. Manisera received one hundred twenty dollars from Wilczynski and saw Smith receive ten dollars from Wilczynski at the same time that Manisera gave Smith ten dollars. Manisera, in an unresponsive answer, stated that this type of conduct had been done before by him and Wilczynski. An application for a mistrial was denied, and no curative instruction was given by the Court.

After the prosecution rested the defendant-petitioner rested. The Trial Court took argument and indicated that it would charge accessorial conduct and acting in concert. Counsel as part of his objection asked the Court to review the grand jury minutes to determine if they had considered accessorial conduct. The prosecution refused comment on this application and the Trial Court refused to examine the minutes or to question the prosecution with respect to his presentation of the case to the grand jury. The Trial Court did ask "was there any finding by the grand jury expressly made that the defendant did not act in concert of aiding and abetting another or aided and abetted by another?" The answer was an evasive negative.

The prosecutor's summation was based upon the Accessorial Conduct Theory and the Trial Court's charge contained the language of the New York State Penal Law Section 20.

The defendant-petitioner was acquitted of Grand Larceny in the second degree and convicted of Grand Larceny in the third degree and official misconduct. (Counts two and three of the indictment).

REASONS FOR GRANTING THE WRIT

The indictment returned by the Grand Jury charged criminal conduct by Joseph Wilczynski and referred to no one else in fact or theory.

The Court, over objection, changed the theory of the Grand Jury indictment by adding the theory of liability through accessorial conduct (New York Penal Law: Article 20). This constituted an improper amendment of the indictment and deprived the Trial Court of jurisdiction to try the case.

Criminal Procedure Law Section 200.50 (7) states, in pertinent part, that an indictment must " . . . assert facts supporting elements of the offense charged." The theory of liability through accessorial conduct would constitute an element of the crime charged; and the indictment must have contained some statement advising the defendant of that element.

In *People v. Boyd,* 397 N.Y.S. 2d 150, at 152, the Appellate Division, Second Department of the Supreme Court of New York State, said:

> "We find that the words in the indictment 'each aiding the other and being actually present' do concern the *theory* of the case as presented to the Grand Jury . . . The Trial court did not have the power to delete or change those words."

If the Trial Court lacked power to change or delete those words of theory, certainly it could not unilaterally add those words to create that theory.

An amendment to an indictment may be ordered by the Court pursuant to New York State Criminal Procedure Law, Section 200.70. That section permits amendment,

> " . . . When such an amendment does not change the theory or theories of the prosecution as reflected in the evidence before the Grand Jury which filed such indictment, or otherwise tend to prejudice the defendant on the merits."

Amending the indictment by adding a theory of aiding and abetting was clear error. A reading of the Grand Jury minutes was appropriate (*People v. Salley,* 72 Misc. 2d, 521) and denial of counsel's application constituted denial of due process. This was precisely stated in *People v. Taylor,* 43 A.D. 2d, 519, wherein the Appellate Court stated:

> "An indictment may not be amended in a manner which changes the theory of the prosecution as reflected in the evidence before the Grand Jury which filed it (CPLR 200.70 subd. 2) . . . . . "

The improper amendment deprived the court of subject matter jurisdiction.

In light of the Appellate Division's decision in the instant matter, the 1st Department of the Supreme Court of the State of New York and those decisions heretofore cited from the Appellate Division, 2nd Department of the Supreme Court of the State of New York, there is an apparent disparity between applicability of the law. In the present posture of the law of the State of New York it is conceivable that an accused who will be tried within the jurisdictional perimeters of the Second Judicial Department would have different legal principles applied than such an accused being tried within the jurisdictional

perimeters of the First Judicial Department. This present posture of the applicability of different principles of law within the confines of the same state is basically repugnant to a good sense of fairness.

The amended indictment was invalid as can be seen by the following language contained in *People v. Brumfield,* 31 AD 2d 726, 297 NYS 2d 31 at 32:

> "Furthermore the amendment sought to substitute and allege a crime not charged by the Grand Jury and was therefore completely invalid and bestowed no jurisdiction upon the court to try the crime charged in the court as amended."

The requirement of advising a defendant of the charges against him is one of constitutional dimension. In Wharton's Criminal Law and Procedure (vol. 4, Section 1760, at page 553) it is stted:

> "Every material fact and essential ingredient of the offense, must be alleged with precision and certainty, or, as has been stated, every fact which is an element in a prima facie case of guilt must be stated in the indictment. Whether at common law or under statute, the accusation must include a characterization of the crime and such description of the particular act alleged to have been committed by the accused as will enable him properly to defend against the accusation, and the description of the offense must be sufficiently full and complete to accord to the accused his constitutional right to due process of law."

The United States Supreme Court has rejected amendments except by resubmission to the Grand Jury in *ex parte Bain,* 121 US 1, 30 LED 849; *Stirone v. United States* 361 US 212, 4 LED 2d 252; and *Russell v. United States,* 369 US 749, 8 LED 2d 240.

In *Russell v. United States* 349, US 749 at 770-771, the Court perpetuated the language of Bain which was the foundation in Stirone:

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer, may be fritered away until its value is almost destroyed . . . Any other doctrine would place the rights of the citizen, which were intended to be protected, by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists."

In *Stirone,* Mr. Justice Black, writing for the court stated at page 217:

> "although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition . . . is neither trivial, useless, nor innocuous. (Citations omitted). While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. *Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error."* (Emphasis supplied).

When the trial court charged the theory of accessorial conduct over objection it affectively amended the indictment and violated substantial rights of the Petitioner. The indictment was therefore void and no legal conviction could result.

The very core of the legal problem presented in the instant matter finds itself rooted with the concept that an accused was indicted and charged with one crime and most possibly tried and convicted for another. Such a situation violates all the basic tenets and fundamental rights under the United States Constitution.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR A WRIT OF CERTIORARI BE GRANTED.

Respectfully submitted,

MICHAEL S. WASHOR
A Member of the Bar of the
United States Supreme Court

WASHOR & WASHOR, ESQS.
Attorney for Petitioner
on Petition for Certiorari

APPENDIX "A"

CERTIFICATE DENYING LEAVE TO APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. JACOB D. FUCHSBERG,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH WILCZYNSKI

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
November 1, 1978

s/Jacob D. Fuchsberg
Associate Judge

* Description of Order: Order of Appellate Division, entered October 12, 1978 affirming a judgment of Supreme Court, New York County, rendered September 6, 1977.

APPENDIX "B"

ORDER OF AFFIRMANCE OF THE APPELLATE DIVISION FIRST DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 12th day of October, 1978

Present:

Hon. Francis T. Murphy, Jr., Presiding Justice
Hon. Vincent A. Lupiano
Hon. Herbert B. Evans
Hon. Myles J. Lane
Hon. Joseph P. Sullivan, Justices

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JOSEPH WILCZYNSKI,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Kassal, J.), rendered on September 6, 1977, convicting defendant, after a jury trial, of the crimes of grand larceny in the third degree and

official misconduct, and said appeal having been argued by Mr. Michael S. Washor of counsel for the appellant, and by Harriett Galvin of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The case is remitted to the Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

ENTER:
Joseph J. Lucchi
Clerk.

APPENDIX "C"

CONSTITUTIONAL AMENDMENTS

ART. V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ART. XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "D"

NEW YORK STATE CRIMINAL PROCEDURE LAW SECTION 220.50

INDICTMENT: FORM AND CONTENT

An indictment must contain:

1. The name of the superior court in which it is filed; and

2. The title of the action; and

3. A separate accusation or count addressed to each offense charged, if there by more than one; and

4. A statement in each count that the grand jury, or, where the accusatory instrument is a superior court information, the district attorney, accuses the defendant or defendants of a designated offense; and

5. A statement in each count that the offense charged therein was committed in a designated county; and

6. A statement in each count that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time; and

7. A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation; and

8. The signature of the foreman or acting foreman of the grand jury, and, except where the accusatory instrument is a superior court information;

9. The signature of the district attorney.

APPENDIX "E"

NEW YORK STATE CRIMINAL PROCEDURE LAW SECTION 220.70

INDICTMENT: AMENDMENT OF

1. At any time before or during trial, the court may, upon application of the people and with notice to the defendant and opportunity to be heard, order the amendment of an indictment with respect to defects, errors or variances from the proof relating to matters of form, time, place, names of persons and the like, when such an amendment does not change the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed such indictment, or otherwise tend to prejudice the defendant on the merits. Where the accusatory instrument is a superior court information, such an amendment may be made when it does not tend to prejudice the defendant on the merits. Upon permitting such an amendment, the court must, upon application of the defendant, order any adjournment of the proceedings which may, by reason of such amendment, be necessary to accord the defendant adequate opportunity to prepare his defense.

2. An indictment may not be amended in any respect which changes the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed it; nor may an indictment or a superior court information be amended for the purpose of curing:

(a) A failure thereof to charge or state an offense; or
(b) Legal insufficiency of the factual allegations; or
(c) A misjoinder of offenses; or
(d) A misjoinder of defendants.

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JOSEPH WILCZYNSKI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the New York Supreme Court Appellate Division, First Department

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

On June 9, 1977, petitioner Joseph Wilczynski was convicted in the Supreme Court, New York County (Kassal, J.), after a jury trial, of GRAND LARCENY IN THE THIRD DEGREE (New York Penal Law, section 155.30[1]) and OFFICIAL MISCONDUCT (New York Penal Law, section 195.00). On September 6, 1977, petitioner was sentenced to a term of nine-months imprisonment on each charge,

the terms to run concurrently. By an order entered October 12, 1978, the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed the judgment against petitioner without opinion. On November 1, 1978, leave to appeal to the New York Court of Appeals was denied. Petitioner is presently incarcerated pursuant to the judgment against him.

Petitioner now seeks a writ of certiorari to review the order of the Appellate Division, First Department, entered on October 12, 1978.

Constitutional and Statutory Provisions Involved

1. The fifth amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. * * *

2. The fourteenth amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any State deprive any person of life, liberty or property, without due process of law. * * *

3. New York Penal Law, section 20.00 provides:

> When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

4. New York Criminal Procedure Law, section 200.70 (2) provides in pertinent part:

> An indictment may not be amended in any respect which changes the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed it * * *.

Statement of the Case

The evidence at trial established that on November 20, 1975, petitioner, a New York City police officer, entered and searched the apartment of Aida Velasquez with three of his fellow officers, Anthony Manisera, Matthew Smith and Frank Farrelly. Petitioner stole approximately $300 to $400 in cash which he recovered during the search. He distributed the proceeds amongst himself, Manisera and Smith. Officer Smith removed a bag containing $15,000 from the apartment. This money represented the proceeds from the sale of heroin which Velasquez's boyfrier transacted in the apartment. Smith vouchered only $355 of this money, as well as guns and drugs which were also recovered during the search, and kept the rest of the money for himself.

In an indictment filed on July 14, 1976, petitioner was charged with grand larceny in the second and third degrees and official misconduct.* At the conclusion of petitioner's trial, the court instructed the jury with respect to the principles of criminal liability for the conduct of another, pursuant to New York Penal Law, section 20.00. Defense counsel objected to this instruction on the ground

* Anthony Manisera and Matthew Smith were separately indicted and convicted.

that petitioner had not been indicted under that theory of liability. Counsel requested that the court inspect the grand jury minutes to determine if the grand jury had considered that theory. The court denied the request.

On June 9, 1977, the jury found petitioner guilty of grand larceny in the third degree and official misconduct; he was acquitted of grand larceny in the second degree.

On appeal to the Appellate Division of the New York Supreme Court, petitioner argued that by instructing the jury on accessorial liability, the court changed the theory of the indictment which had charged defendant with the direct commission of the crimes. This, petitioner argued, constituted an improper amendment of the indictment in violation of New York Criminal Procedure Law, section 200.70(2) as well as petitioner's constitutional rights. Although not specifying what constitutional rights were thereby violated, petitioner relied on *Ex parte Bain*, 121 U.S. 1, 10 (1886) in which this Court held that an amendment of an indictment without resubmission to the grand jury is violative of the fifth amendment provision mandating indictment by a grand jury. The Appellate Division rejected these contentions without opinion. Petitioner's application for leave to appeal to the Court of Appeals was subsequently denied.

ARGUMENT

No substantial question is presented by petitioner's claim that the court's charge on accessorial liability constituted an amendment of the indictment which violated petitioner's fifth and fourteenth amendment rights.

Petitioner claims that by instructing the jury on accessorial liability pursuant to New York Penal Law, section 20.00, the trial court amended the indictment which had charged defendant with the direct commission of the crimes. This, petitioner argues, deprived him of due process and of his right to be indicted by a grand jury.

Petitioner's constitutional claims are wholly insubstantial and do not merit review by this Court.

Petitioner's claim of deprivation of his right to be indicted by a grand jury is groundless since it is long settled that the due process clause of the fourteenth amendment does not require an indictment by a grand jury in a State prosecution. *Hurtado* v. *California*, 110 U.S. 516 (1884). *See Alexander* v. *Louisiana*, 405 U.S. 625, 633 (1972). Even if that right were held applicable to the States, petitioner's claim under that provision as well as his due process claim would nevertheless fail since the court's charge on accessorial liability did not constitute an amendment to the indictment. Accessorial conduct is not a distinct crime or an element of a crime, as petitioner claims; it is merely a theory of liability. One cannot be convicted of accessorial conduct, but only of the underlying crime which he aids another to commit. Thus, it is well established in New

York that an indictment need not charge a defendant with aiding and abetting in the commission of a crime in order to permit proof of such conduct at trial as the basis of defendant's liability. *People* v. *Katz,* 209 N.Y. 311, 325-26 (1913); *People* v. *Valerio,* 64 A.D.2d 516 (1st Dep't 1978). Similarly, it has been uniformly held in the federal courts of appeal that section 2 of title 18, United States Code, the comparable federal statute, is embodied in every indictment as an alternative theory of liability, should the prosecutor opt to prove his case by that theory. *E.g., United States* v. *McCambridge,* 551 F.2d 865, 871 (1st Cir. 1977); *United States* v. *Maselli,* 534 F.2d 1197, 1200 (6th Cir. 1976); *United States* v. *Pellegrino,* 470 F.2d 1205, 1209 (2d Cir. 1972), *cert. denied,* 411 U.S. 918 (1973); *Levine* v. *United States,* 430 F.2d 641, 643 (7th Cir. 1970), *cert. denied,* 401 U.S. 949 (1971).

This Court has on more than one occasion upheld convictions on the theory of aiding and abetting where that theory was submitted to the jury but was not set forth in the indictment. *Nye & Nissen* v. *United States,* 336 U.S. 613, 618-20 (1949); *Pereira* v. *United States,* 374 U.S. 1, 9-11 (1954); *see Jin Fuey Moy* v. *United States,* 254 U.S. 189, 192 (1920). Thus, the question raised by petitioner is wholly insubstantial, having been foreclosed by prior decisions of this Court. *Palmer Oil Corp.* v. *Amerada Corp.,* 343 U.S. 390 (1952).

Notably, petitioner does not now claim, nor did he claim on appeal, that he was unfairly surprised by proof that he acted in concert with others or by the court's charge in accord with that proof, such that he could not properly defend against the charges. Indeed, prior to the commencement of the pre-trial identification hearing in this case, the prosecutor stated on the record that he intended to elicit proof at trial that defendant had acted in concert with others (Record at 52-54).* Clearly, petitioner cannot claim that he was denied due process.

In urging this Court to exercise its discretion and review his claim, petitioner points to an alleged conflict in decisions between the First and Second Judicial Departments of the Appellate Division of the New York Supreme Court. Clearly the New York Court of Appeals is the more appropriate forum to resolve such a conflict, if such a conflict were found to exist. In fact, the Second Department decision relied on by petitioner, *People* v. *Boyd,* 59 A.D.2d 558, 560 (2d Dep't 1977) is not in conflict with the decision in the First Department in the instant case. In *Boyd,* the court below had deleted the aiding and abetting provision of the indictment. The Second Department held that the deletion constituted an improper amendment of the indictment. However, the holding in *Boyd,* that surplusage once pleaded is binding, is not the same as the requirement that such surplusage must be pleaded in the first instance. While an indictment need not charge a defendant with aiding and abetting in order to support proof of such conduct at trial, once the grand jury charged that theory, the court was without power to amend the indictment. Thus, the two decisions are easily reconciled.

In sum, petitioner has put forth no basis for this Court to review his claim. His claim of constitutional deprivation

* The record, which was not included with the petition, can be made available at the Court's request.

does not merit consideration since he fails to allege how he was prejudiced by the court's instructions. Moreover, the question he raises has been uniformly settled in the federal and New York courts. Since petitioner points to no controversy calling for resolution by this Court, the petition should be denied.

Conclusion

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January, 1979

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